

EXHIBIT A



IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
ex rel. JONATHAN SKRMETTI,
ATTORNEY GENERAL and REPORTER,

Plaintiff,

vs.

Case No. 23-1364-IV

META PLATFORMS, INC. and
INSTAGRAM, LLC,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-captioned
cause came on for hearing on this, the 17th day of
May, 2024, beginning at 9:14 a.m., before the
Honorable Russell T. Perkins, when and where the
following proceedings were had, to wit:

Reported by: TERRI BECKHAM, RMR, CRR, LCR

A P P E A R A N C E S

For the Plaintiff:

BRIAN T. PHELPS
CHRISTOPHER A. DUNBAR
Attorneys at Law
Office of the Attorney General
UBS Building, 20th Floor
315 Deaderick Street
Nashville, Tennessee 37243
615.741.1671
brian.phelps@ag.tn.gov
chris.dunbar@ag.tn.gov

For the Defendants:

ROBERT E. COOPER JR.
COURTNEY A. HUNTER
REAGAN P. SCHMIDT
Attorneys at Law
Bass, Berry & Sims, PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
615.742.6200
bob.cooper@bassberry.com
courtney.hunter@bassberry.com
reagan.schmidt@bassberry.com

GREGORY L. HALPERIN
Attorney at Law
Covington & Burling, LLP
620 Eighth Avenue
New York, New York 10018
212.841.1000
ghalperin@cov.com

large number of depositions.

THE COURT: I would just say this. I will just say we've got a -- the lawyers in this case are of the highest ability and the highest ethical quality. We do have a local Rule 5.04 that talks about scheduling and things like that and courtesies and all that. It might be a courtesy to provide them an estimate. I'm not going to order you to do it. That's something for you to consider.

MR. PHELPS: Thank you, Your Honor.

THE COURT: Use your own professional judgment. Okay. Good point. Thank you for raising it.

MR. HALPERIN: Thank you, Your Honor.

MR. PHELPS: And, Your Honor, for all of these we'll work together to create proposed orders to memorialize the Court's ruling in writing.

MR. HALPERIN: Absolutely, Your Honor.

THE COURT: All right. Thank you. Next motion.

MR. HALPERIN: The Tennessee attorney general brought suit in the name of Tennessee. Counsel has signed pleadings, including its opposition to this very motion, on behalf of, quote, the plaintiff State of Tennessee. They've entered

appearances on behalf of plaintiff State of Tennessee, and they've introduced themselves at hearings and depositions as counsel for the State of Tennessee. Yet when Meta served discovery on plaintiff, the State of Tennessee, for its counsel, the attorney general's office, the attorney general's office refused that discovery on the grounds that the State of Tennessee is not a party, only the attorney general.

State agencies should be treated as parties to this case for two reasons. First, Your Honor, the State of Tennessee is a singular entity, and the attorney general's participation in this suit is as counsel for that entity, not as a party himself.

That's clear not just from the case caption and the signature block and the appearances, but also from the relief that the State is seeking. The attorney general is not alleging that he personally or his office has been injured in this case. Instead, he's alleging and suing, in the words of the complaint, to "protect the public." That's at paragraph 26 of the complaint.

Courts routinely hold that when an attorney general elects to bring suit in the name of

a state or on behalf of the public, party discovery includes discovery of the state's agencies. We cited Your Honor to Washington versus GEO from the Western District of Washington where the Court held, "Where the plaintiff is the state of Washington, discovery addressed to the state includes its agencies."

And in the opioid litigation where states brought consumer protection claims, much like the claims Tennessee brings here, there again on behalf of the public, state courts in New York, in New Mexico, and in South Carolina all held that the attorney general was required to produce documents from state agencies.

For example, in the state court litigation, the Court held that where State brings litigation on behalf of, quote, the people of the state of New York for civil penalties under the Consumer Protection Act and public nuisance claims, the State was required to "search and produce documents from the agencies likely to possess responsive documents."

Because the state that this action has brought -- the complaint does not state that this action was brought only on behalf of specific state

agencies or offices. So that's the first reason, Your Honor, the complaint and the cause of action themselves make plain that the plaintiff in this case is the State of Tennessee.

But, second, even if the Court were to treat the plaintiff in this case as the attorney general himself or his office, parties are required, under Rule 34.01, to produce documents within their possession, custody or control, and the attorney general has control over state agency documents.

The attorney general, as Your Honor is well familiar, is required under Tennessee law to represent all agencies and to direct all civil litigation in which agencies have an interest. If Meta were to serve third-party subpoenas on the agencies from which it's seeking discovery here, the attorney general -- or Meta, excuse me, would be required to serve those agencies via subpoenas on the attorney general's office, and the attorney general doesn't deny that it would represent those agencies in responding to those subpoenas.

The Western District of Tennessee has already held that this unique role held by the Tennessee Attorney General gives the attorney general possession, custody or control of agency

documents, applying the very same "legal right to control" test that the parties agree Tennessee state courts apply and that Your Honor should apply here.

In Board of Education of Shelby County versus Memphis City Board of Education, the Court held that the attorney general was required to produce documents from the General Assembly even though the General Assembly was not a named party in the case, because "The attorney general of the State of Tennessee has been statutorily tasked with extensive duties as the state's legal representative," and there was, "No information in the record indicating that the attorney general does not have the legal right to obtain responsive documents on demand from the General Assembly."

That same reasoning applies here where the attorney general would be required to represent all of the agencies in responding to discovery and where no statute prohibits the attorney general from obtaining agency documents in the course of prosecuting a lawsuit on behalf of the state.

And the recent law that General Cooper referenced this morning confirms that. That law, 2024 Public Chapter 776, purports to deprive the attorney general of control while prosecuting

antitrust suits but not while prosecuting Tennessee Consumer Protection Act suits.

Other state and federal courts have reached the same conclusion, applying the same control test that Tennessee applies here. For example, in the two *In re Generic* decisions that we cited Your Honor to, the Eastern District of Pennsylvania held that 11 state attorneys general across the two cases had to produce documents of other state agencies because they provide legal services to those agencies and because no statute expressly deprives the attorney general of access to the agencies' documents.

Notably, Your Honor, Tennessee was a party in the *In re Generic* cases. There Tennessee actually resolved this dispute via stipulation. General Janssen, on behalf of the State of Tennessee, filed a stipulation saying that Tennessee would produce documents from four state agencies, including the Tennessee Department of Health, an agency likely that Meta is seeking discovery from here.

I have for Your Honor a copy of that stipulation if you'd like it, and for opposing counsel.

THE COURT: Please.

MR. HALPERIN: May I approach, Your Honor?

THE COURT: Yes, you may.

MR. HALPERIN: And if Your Honor turns to page 4, you'll see the list at the top of the page of the departments for which Tennessee agreed to produce discovery. That stipulation belies any representation by the attorney general here that they cannot access documents from other state agencies.

It shouldn't go unnoticed, Your Honor, that the same day the attorney general argued for limitless discovery on Meta, it asserts that Meta is entitled to virtually no party discovery of it. Accepting the State's position would mean that party discovery in this case largely flows only in one direction and that the discovery Meta must take of the State is primarily under the more stringent rule 45.02 standard. Courts have rejected that very outcome.

Again in the opioid litigation, I direct Your Honor to State versus Purdue out of the New Mexico state court system. The New Mexico state court recognized that "If state agencies could avoid

their discovery obligations by contending that the attorney general's office is a separate entity, civil litigation involving the state would be severely compromised."

That unfairness that the New Mexico court recognized would be particularly acute here for two reasons. First, as I mentioned, the agencies that Meta is seeking discovery of inevitably will be represented by the Tennessee Attorney General's office. It serves no valid purpose for Meta to be required to serve each state agency individually and negotiate individually the scope of identical RFPs with each agency when all the agencies will be represented by either the lawyers in this courtroom or within the same office.

Second, Your Honor, civil penalties under the TCPA don't go to the attorney general's office itself. By statute they're paid to the State. The State shouldn't get to potentially recover penalties while being immune from the obligations of participating in the underlying litigation for purposes of discovery.

For these reasons, Your Honor, we ask Your Honor to grant our motion to compel the State to produce discovery from its state agencies. Thank

you.

THE COURT: Thank you.

MR. DUNBAR: Good morning, Your Honor.

THE COURT: Good morning.

MR. DUNBAR: I'm Chris Dunbar on behalf of the State of Tennessee. I know we're dealing with a number of issues today, and all those have been well-briefed in the papers, so I will try my best to be succinct.

The requests are improper because they seek Rule 34 party discovery from other arms of Tennessee state government who are not party to this litigation. The attorney general sued Meta under his enforcement authority for violating the Tennessee Consumer Protection Act. The complaint does not bring suit on behalf of any other arm of Tennessee state government. It does not seek recovery for any other arm of Tennessee state government or discuss harm to any other arm of Tennessee government, unlike Meta's cited opioids cases, the Washington AG case reference, and the Generics matter involving the stipulation from Mr. Janssen. If Your Honor would like to hear more from Mr. Janssen about that, he's available.

Under these circumstances, the attorney

general has neither actual possession, custody or control of the at-issue documents, nor the legal right to obtain them. The fact that the attorney general represents other arms of state government in other contexts makes no difference in this enforcement action. As described in our papers, the General Assembly has prescribed specific circumstances under which the attorney general may direct other arms of Tennessee government, but those do not apply here.

In those circumstances our office is acting as a lawyer for the other arms of Tennessee state government, as in the Shelby County case cited by Meta. But here, Your Honor, the attorney general is operating under his unique prerogative to grant an enforcement action, and the General Assembly has not afforded the attorney general any legal right to obtain materials from other arms of Tennessee in this case.

The most persuasive and analogous authority is the American Express case, Your Honor, which concerned a consumer protection enforcement action brought by the Tennessee attorney general, just like this case. There the Eastern District of New York rejected Amex's efforts to obtain agency

materials through first-party discovery requests. That court explained, "To find that the attorney general has control over the documents in possession of state agencies that operate wholly independently of the attorney general would be giving the governor's office and state agencies a virtual veto over the policy decision to bring an enforcement action that rightfully lies with the attorney general."

That court continued, "Legally the attorney general has no more way of compelling production than Amex does if an agency refuses to cooperate. I cannot order a party to produce that which it does not have and that to which it does not have any right or recourse to acquire."

Now, Your Honor, all of these arguments apply with particular force here in Tennessee where the attorney general is a constitutional instrument of the judicial branch of government. The request will require the attorney general to produce materials from, among other sources, the General Assembly, the office of the governor, and various legislative and executive branch instrumentalities. But the Tennessee constitution expressly prohibits any encroachment by one branch of government upon

the others unless directed or permitted by some other provision of the constitution, and the attorney general is not so authorized when he brings an enforcement action.

In other words, Your Honor, Meta's request would burden the attorney general because they ask him to defy the separation of powers doctrine in the Tennessee constitution.

Of course, none of this is to say Meta cannot request these materials. Rule 45 of the Tennessee Rules of Civil Procedure permits Meta to seek the same discovery directly from the third parties, as our office has told Meta for months now. It is true that other divisions of our office may provide counsel to arms of Tennessee government as those arms respond to Rule 45 discovery that they receive. Let's be clear, that is the exception to the rule, as they have their own capable in-house counsel. And in any case, that point does not undermine the State's position here. Tennessee law requires our office to play many distinct roles, but those responsibilities should not be conflated as Meta's improper requests would require.

Because the attorney general possesses neither actual nor legal control of the third-party

materials sought by requests, and because Rule 45 affords Meta the legal ability to pursue the same materials directly from the third parties, the third-party discovery process is plainly the less burdensome means for acquiring the requested information, and this Court should deny Meta's motion to compel.

Unless Your Honor has any questions, I'll leave it there.

THE COURT: No questions.

MR. HALPERIN: Very briefly, Your Honor, the most directly on-point case is the case under Tennessee law, the Shelby County case, not the Amex case. Amex did not analyze the legal-right test that this Court looks to and that the Tennessee federal court looked to in Shelby County to determine whether the attorney general's office has control. Instead, the American Express case merely asks whether the agency and the attorney general were subject to common executive control, didn't look to the legal-right test.

And when you look to the most relevant case here, when you look to Shelby County, decided in the Western District, what you'll see is that Shelby County expressly rejected the separation of

powers argument that the State makes here. In Shelby County II, where the Court supplemented its opinion, the Court said this: "The relationship between the attorney general and its represented parties is not a matter for this Court to determine. The Court must simply determine the scope of appropriate discovery under the Federal Rules of Civil Procedure. Thus the Court will not further address the separation of powers issue."

You see that again and again through the cases we cited. You look again to the Purdue case out of the New Mexico District Court. While it is true the attorney general and the governor are separately elected with separate responsibilities, the New Mexico statutes grant the attorney general broad authority in handling litigation on behalf of both the state of New Mexico and state agencies and, therefore, rejecting the argument the State makes here.

The Illinois case we cited versus Monsanto in our briefs rejected that very "virtual veto" concern that the State raises as "speculative," "conclusory," and "unpersuasive," the words of that court. Courts have rejected the separation of powers because we're not asking Your

Honor to violate the separation of powers between agencies. We're simply asking Your Honor that when a party brings a case, they have to comply with the Tennessee Rules of Civil Procedure, and they have to produce the documents that they have control over.

Finally, Your Honor, the State says that it's less burdensome for Meta to negotiate its scope of discovery requests with individual agencies that aren't here rather than negotiating it through the parties that are. I think Your Honor, on its face, that argument doesn't pass muster. The least burdensome way to get the discovery is to negotiate with the attorneys here in this courtroom all at once, not individually with varied state agencies. Thank you.

THE COURT: Thank you. The Court's going to make a practical ruling on this. I'm going to grant the motion in part and deny it in part, and will require that Rule 45 subpoenas be used related to documents sought from the Legislature or from the governor's office, and that, otherwise, the normal Rule 34 requests for production will suffice as to the other state agencies from which information is being sought.

So that's the Court's effort to not let

form be elevated over substance. Let's get this going in a way that makes sense in terms of efficiency. I don't think it does any violence to any constitutional or statutory principle for this Court to rule in this unique case and in these unique circumstances as I have ruled.

So that's the Court's ruling.

Clarifications? Again, since we don't have a written ruling, I'm happy to try to give them if anybody needs to clarify what the Court is saying.

MR. HALPERIN: Not from defendants, Your Honor.

MR. PHELPS: One point of clarification, Your Honor, and maybe we can work through this with counsel, but the way Meta has defined the State, there's no specifications as to which agencies they're referring to. So in that way it's unclear if they're asking the State to canvas every agency within the State. We heard Mr. Halperin reference the Department of Health. It would be helpful if Your Honor had guidance or Meta was able to provide guidance about which agencies, rather than the attorneys in this room having to take the burden of understanding how to interpret Meta's requests in that way or the Court's order in that way.

THE COURT: Gotcha.

MR. HALPERIN: If I may, Your Honor, we had this similar dispute arise in the MDL, and the judge did order us to provide a list of the agencies from which we're seeking discovery. We're happy to provide a similar list to Tennessee.

THE COURT: Okay. Make sure that's reflected in the order.

MR. PHELPS: And, Your Honor, too I think -- I just want to be clear. Mr. Halperin made a statement that discovery would be in this way negotiated by all the attorneys in this room. I think the State attorney general's office would request permission to evaluate this order, but perhaps also involve attorneys who are in the regular business of representing agencies from whom Meta is seeking discovery. And so I just want to make sure that that point is clear on the record. I think we're free to staff this matter as we wish.

THE COURT: I think you should have that opportunity.

MR. PHELPS: Okay. Thank you.

THE COURT: Thank you.

MR. COOPER: Your Honor, we're on the last motion here, and this is Meta's motion to seal